# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-1492

LOYD ERASTUS DYAL, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on all four counts of an indictment which charged him with possession, custody and control of a distillery apparatus without proper registration, with carrying on the business of a distillery without having given bond, with making mash on premises other than on lawfully designated premises and with possession of distilled spirits, in violation

of 26 U.S.C. 5179(a), 5601(a)(1), (4) and (7), 5173(a), 5205(a)(2), and 5604(a)(1). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed without opinion on February 29, 1972, and a petition for rehearing was denied on March 29, 1972 (Pet. App. A and B). The petition for a writ of certiorari was filed on May 15, 1972, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the petition raises no issues warranting review by this Court.

In brief, the evidence showed that in August 1969, petitioner had a large moonshine still built and brought to his premises in Tampa, Florida. At no time did he post the bond required by law for the operation of a distillery. On September 9, 1969, government agents executed a search warrant on his premises and seized ninety gallons of mash, the still and an unstamped jug filled with distilled spirits. In his defense, petitioner admitted fermenting mash and operating the still on the date of its seizure (Tr. 247-248), but claimed that he had been entrapped by a state officer.

As part of his defense, petitioner called four witnesses who each testified that petitioner's reputation for telling the truth was good (Tr. 297, 334, 336, 339). The sole contention here is that the trial court erred in allowing the government to cross-examine these character witnesses as to whether they had heard that petitioner had been arrested for furnishing false statements in the purchase of a firearm sub-

sequent to the date of the offenses for which petitioner was being tried (Tr. 331, 334, 336, 339). The court permitted the cross-examination after a lengthy discussion of this issue with counsel out of the presence of the jury (Tr. 297-331).[1] Thereafter three of the witnesses replied that they had read about the arrest in the newspaper.

The cross-examination of these character witnesses was proper since such "cross-examination may take in as much ground as the testimony it is designed to verify." *Michelson* v. *United States*, 335 U.S. 469, 484. Here, after petitioner sought to bolster his credibility at the time of trial by showing that his reputation for telling the truth was good, the government questioned his character witnesses with information that may have affected that reputation. See *United States* v. *Null*, 415 F.2d 1178, 1180 (C.A. 4), where the court noted: "With the defendant's credibility as a witness in issue, his reputation *at the time of trial* was crucial and, therefore, relevant." *Gross* v. *United States*, 394 F.2d 216 (C.A. 8), upon which petitioner relies, is not to the contrary. In that case, the witnesses who testified to the defendants' reputation in Helena, Montana, were cross-examined

[1] Although petitioner pointed out that the arrest involved was a recent charge (Tr. 324), he did not contend in the trial court that reputation evidence subsequent to the time of the commission of the earlier charge was incompetent.

about the defendants' reputations at a different place and at a different time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JULY 1972.

[2] Moreover, unlike this case, the court in *Gross* made no effort to ascertain whether there was a basis in truth for the questions asked in cross-examination.

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